Supreme Court, U.S.
FILED

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No. ___

IN THE

Supreme Court Of The United States

OCTOBER TERM 1993

HERBERT MEISLER,
Petitioner

vs.

GANNETT COMPANY, INC.,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

BRIEF OF PETITIONER

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HERBERT MEISLER

34 pp

QUESTIONS PRESENTED

A: WHETHER THE ACTUAL MALICE RULE OF *TIMES V. SULLIVAN* SHOULD BE OVERRULED OR LIMITED.

B. WHETHER THE DECISION OF THE ELEVENTH CIRCUIT FAILS TO FOLLOW THE GUIDELINES SET FORTH BY THIS COURT IN *HARTE-HANKS VS. CONNAUGHTON,* 491 U.S. 657 (1989).

CERTIFICATE OF INTERESTED PERSONS

Respondents' Counsel	James C. Barton, Sr. Johnson, Barton, Proctor, Swedlaw & Naff
	Robert C. Bernius Nixon, Hargrave, Devans & Doyle
	Edward S. Sledge, III Hand, Arendall, Bedsole, Greaves & Johnston
Petitioner's Counsel	William J. Baxley Baxley, Dillard, Dauphin & McKnight
Respondents	Gannett Company, Inc. Gannett Satellite Information Network, Inc.
USA Today	
Trial Judge	Hon. Alex T. Howard Jr. United States District Judge
Petitioner	Herbert Meisler
11th Circuit Judge Panel	
	Hon. Joseph W. Hatchett Hon. Emmett R. Cox Hon. Paul H. Roney

No other persons are known to have participated directly or indirectly in the appeal of this matter.

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STATEMENT OF GROUNDS OF JURISDICTION

The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1254(1) because this Petition is from a decision of the Eleventh Circuit Court of Appeals in a civil case.

(i) Date of the decree: January 28, 1994

(ii) No hearing or extension of time has been sought.

(iii) No cross petition has been filed.

(iv) Jurisdiction is based on 28 U.S.C. § 1254(1) and Rule 10.1(a) of the Rules of the Supreme Court.

STATEMENT OF THE CASE

(I) Nature of Case, Course of Proceedings and Disposition

On August 20, 1991 Plaintiff's complaint of libel was removed from the Circuit Court of Mobile County, Alabama to the United States District Court for the Southern District of Alabama, Southern Division. After discovery, Defendants filed a Motion for Summary Judgment, and both parties submitted evidentiary materials and briefs. The District Court granted summary judgment for the Defendants on October 28, 1992. Timely notice of appeal was filed on November 24, 1992.

On January 28, 1994, the 11th Circuit of Appeals rendered its decision affirming the District Court's order.

(II) Statement of Facts with References to Record

In late 1987, Herbert Meisler, plaintiff, and Harold Ripps became interested in dog racing. (R15, Exh. 3, pp. 117, 118). In October of 1988 Meisler, Ripps, Herman Maisel and his son Elliot Maisel formed the American Racing Group, as equal partners, to hold their interest in

greyhound racing parks in Wisconsin, Kansas and Texas. (R15, Exh. 4, pp. 24-29, 19-20). The four Alabamians were known as "the Alabamians" or the "Alabama four". (R15, Exh. 3, p. 117).

The four Alabamians, along with investors from the State of Wisconsin, formed Dairyland Greyhound Park, Inc., which was granted a license to operate the Dairyland Greyhound Park to be established in Kenosha, Wisconsin. The four Alabamians held 37 percent of the stock in Dairyland Greyhound Park, Inc. but provided the entire $40 million to fund the venture. (R15, Exh. 3, pp. 121, 22).

The Dairyland Greyhound Park opened for business on June 20, 1990. (R15, Exh. 2, p. 33). Shortly after the dog track opened, the Wisconsin Racing Board filed a Petition for Disciplinary Action against Dairyland Greyhound Park, Inc. The controversy became inflamed, was the subject of widespread news coverage, but was resolved prior to a public hearing regarding the operating license on Thursday, December 20, 1990. Instead of the hearing, the Wisconsin Racing Board announced that a settlement that resolved the disciplinary action had been reached with Dairyland Greyhound Park, Inc. (R15, Exh. 8, 9; and R15, Exh. 7, pp. 44, 49, 50).

Between 4:00 and 4:35 P.M. EST, the Wisconsin Racing Board announced the settlement. The executive director of the Wisconsin Racing Board specifically stated the settlement resulted in:

> Number 2, complete and total divestiture of all culpable individuals in this matter; both Elliot Maisel and Herman Maisel have tendered their stock certificates to an escrow account to be turned over to the corporation and to be reissued to the purchaser.
>
> (R15, Exh. 7, p. 50)

Elliot and Herman Maisel, two other investors from Alabama, were, according to the Wisconsin Racing Board, the culpable individuals. Plaintiff was not named as a culpable individual.

The Settlement Agreement between the Wisconsin Racing Board and Dairyland provided that Dairyland, not Meisler, would pay a $1,000,000.00 forfeiture, required Meisler and Ripps to purchase the stock of Elliot and Herman Maisel, and prohibited Elliot and Herman Maisel from becoming officers and directors of Dairyland (R17, Exh. 4, p. 2-6). The Consent Order specifically stated no fines or forfeitures were being imposed against Meisler. (R17, Exh. 5, p. 2).

The December 21, 1990 issue of *USA TODAY* reported the settlement as follows:

> WISCONSIN
>
> KENOSHA — Dairyland Greyhound Park can reopen Jan. 2, state racing board said. Board removed 4 controversial Alabama investors from track ownership, ordered 4 to pay state $1 million as part of settlement of state racing board violations this year . . .
>
> (R15, Exh. 1)

After the news item appeared in *USA TODAY*, Meisler, through his attorney, requested a retraction:

> We represent Harold Ripps and Herman Meisler. Mr. Ripps and Mr. Meisler are two of four prominent and respected Alabamians who invested in Dairyland Greyhound Park, Inc.
>
> In the December 21, 1990 issue of *USA TODAY*, the paper stated:
>
> "Board removed 4 controversial Alabama investors from track ownership, ordered 4

> to pay state $1 million as part of settlement for state racing board violations this year. . . . "

These statements are false. Mr. Ripps and Mr. Meisler demand an immediate retraction. This retraction must be in a prominent position.

The Wisconsin Racing Board not only did not "remove" my clients from track ownership but allowed them to *DOUBLE* their ownership interest. The four Alabama investors have not been ordered to pay $1 million in settlement. In fact, none of them were ordered to pay one cent to the Racing Board or any other entity. They were not fined, penalized or ordered to do anything. The actual order entered by the Board states as follows:

> "No sanctions, fines or forfeitures are being imposed under this Consent Order against Harold W. Ripps, Herbert A. Meisler. . . . The allegations of the Amended Petition are dismissed with prejudice as to Harold W. Ripps, Herbert A. Meisler. . . . "

Mr. Ripps and Mr. Meisler have business interests in several states and their involvement in Dairyland Greyhound Park is well known. Your intentional or reckless libel has caused them irreparable harm.

(R17, Exh. 7)

The following "correction" was published in *USA TODAY* on December 28, 1991:

> WISCONSIN
>
> CORRECTION — State Racing Board barred 4 Alabama investors from Dairyland Greyhound

> Park, Inc. management, but did not order all 4 to give up their ownership shares. Dairyland — not 4 investors — agreed to pay state $1 million for not starting racing on schedule last summer.
>
> (R15, Exh. 3, exh. 3)

The initial news item and the correction were written by Mr. Larry Davis. Davis worked as States Editor for the *USA TODAY* section "Across the USA: News From Every State". His normal day as States Editor began with his searching through wires for news he believed would have some public interest. After his lunch break he would continue going through wires, and begin composing his items into the few lines that went into the paper. (R17, Exh. 6 p. 48, 49) Davis

> "had, like, a 6:00 deadline where [he] had to have everything ready. And usually by then [he'd] have [his] string of states ready and [he'd] know which ones that USA Today was — which items USA Today was taking, which items [he] could use for States Line".
>
> (R17, Exh., 6 p. 49)

According to Davis, "after 6:00, I'd sit there and wait for my okay and, hopefully, everything would be okay". He would leave at approximately 7:30. (R17, Exh. 6, p. 49, 50).

Mr. Davis' instructions were to write about stories which people would find interesting; to not use more than one item from a city; to obtain items that had occurred that day or the night before; and, to use information that is accurate and interesting. He was told most of his information would come from the AP wire. (R17, Exh. 6, p. 52-56).

At his desk, Davis had a computer which accessed the AP wire service. He had to mechanically punch the numbers in to bring up the AP wires — he had to "call it up". (R17, Exh. 6, p. 74). At 4:49 P.M. Eastern Standard Time on December 20, 1990, the Associated Press issued a wire regarding the settlement between the Wisconsin Racing Board and Dairyland. The wire was marked "URGENT" and concluded with the notation "MORE." The wire read as follows:

BOARD OKs DAIRYLAND AFTER ACCEPTING SETTLEMENT

BY RICHARD EGGLESTON
Associated Press Writer

MADISON, Wis. (AP) — The State Racing Board Thursday granted an operating license for 1991 to the troubled Dairyland Greyhound Park Inc. after accepting a settlement that removes the race track's Alabama investors.

Under the settlement, the Alabama Group, American Racing Group Inc., will be dissolved and will pay the State $1.5 million to settle a disciplinary action against those investors.

The State has already received the first $600,000 down payment of the fine and is to receive the remaining $550,000 by Dec. 31.

The decision leaves Dairyland Chairman Richard Decker of Eagle River, a new management team and a group of Wisconsin investors in control of the track.

"I've learned one thing. If you start honest and stay honest, you'll win," Decker told the Board. "It makes one heck of an early Christmas present."

Madison Attorney David C. Mebane, Vice Chairman of the Board who presided at Thursday's meeting, said Dairyland would be held to the letter of its license requirements.

"This Board will continue to monitor the operations of this facility daily," Mebane said. "If this facility falls in violation of any of the regulations, the licensee will be back before this Board post haste."

The settlement also provides for the parties to pay $3.1 million that Dairyland owes to contractors.

Kenosha, Kenosha County and the Town of Somers are to receive $25,000 each for money they lost due to the tardy opening of the track last summer.

MORE

(R17, Exh. 1)

An AP wire marked "URGENT" indicated to Davis that the Associated Press sent the wire out as soon as the writer put the information together. Davis had seen AP wires correct previous AP stories, knew such occurrences were not unusual, and knew a first time story is often changed on subsequent wires. Moreover, it was common knowledge, especially on first time wires marked "URGENT", that subsequent wires would alter or change the story. Mr. Davis clearly understood one had to look out for such changes when one was editing or compiling a story from AP wires. It was even part of his job to go through the wires up until his deadline time. (R17, Exh. 6 pp. 92, 93, 141-143).

At 5:21, Eastern Standard Time, thirty-two minutes after the first AP wire, the Associated Press issued a second wire. The wire read:

URGENT

CLARIFIES that two Alabama investors can retain stock with no role in managing track: UPDATES throughout with further detail background; NOTE story stands for AM-WI — Dairyland on State Digest Board Oks Dairyland After Accepting Settlement<

I, RICHARD EGGLESTON=
Associated Press Writer=

MADISON, Wis. (AP) — The State Racing Board Thursday granted an operating license for 1991 to the troubled Dairyland Greyhound Park, Inc. after two Alabama investors agreed to surrender their stock.

Dairyland agreed to pay a $1 million fine; plus $150,000 in costs for starting racing behind schedule last summer. The agreement settles a disciplinary action against Dairyland and its four Alabama investors.

The State has already received the first $600,000 down payment of the fine and is to receive the remaining $550,000 by Dec. 31.

Under the settlement, The Alabama Group, American Racing Group, Inc. will be dissolved and the remaining two Alabama investors — Harold W. Ripps and Herbert A. Meisler — will have no role in managing the track.

The other Alabama investors, the father and son team of Herman and Elliot Maisel, agreed to place their stock immediately in escrow. If they can't sell it in the next five days, there will be binding Arbitration to sell it by Dec. 30.

In addition, a group of Kenosha investors who bought a small share of Dairyland for $700,000 will get their money back and will keep their stock.

The decision leaves Dairyland Chairman Richard Decker of Eagle Rivers a new management team and a group of Wisconsin investors in control of the track.

"I've learned one thing, if you start honest and stay honest, you'll win," Decker told the Board. "It makes one heck of an early Christmas present."

Madison Attorney David C. Mebane, Vice Chairman of the Board who presided at Thursday's meeting, said Dairyland would be held to the letter of its license requirements.

"This Board will continue to monitor the operations of this facility daily," Mebane said. "If this facility falls in violation of any of the regulations, the licensee will be back before this Board post haste."

Mebane said the settlement was in the interest of the economy of Southeastern Wisconsin and particularly the Kenosha area. The track employs about 900 people.

He says the settlement met the Board's goal of removing the Maisels from any involvement with Dairyland.

"We're just glad it's over," said Terence Dunleavy, The Board's Executive Director.

The settlement also provides for the parties to pay $3.1 million that Dairyland owes to contractors.

> Kenosha, Kenosha County and the Town of Somers are to receive $25,000 each for money they lost due to the tardy opening of the track last summer.
>
> The Racing Board had refused to renew Dairyland's license after a summer of mismanagement allegations.
>
> The Board ruled Dairyland's top management lacked sufficient experience to operate a track after the Maisels withdrew from the operation at the State's demand.
>
> The Maisels had been named in a petition filed by Dunleavy accusing them of fraud, coercion and deception in managing the track.
>
> The allegations had to do with hidden contracts between Dairyland and American Racing Group.
>
> (R17, Exh. 2)

The only wire Mr. Davis read was the initial AP wire. Neither he nor anyone else at *USA TODAY* looked for the subsequent wires. (R17, Exh. 6, pp. 141-143).

In addition to the AP wire, Davis may have relied on a stringer, John Baas, as a source for his news item. As a stringer, Baas was to alert the states editor for *USA TODAY* of the most important stories of the day in the state of Wisconsin. (R23, Exh. 10 4, p. 10).

Bass would normally call *USA TODAY* once a day Monday through Thursday around 5:00 P.M. CST. He would tell the states editor the most important stories of the day and fill him in on any details that weren't on the wires. (R23, Exh. 4, pp. 10-12).

On December 20, 1990, Mr. Bass was not working at his radio station and did not see the AP wires sent to the station. On days he was not working, Mr. Baas would

listen to radio news broadcasts, turn on the T.V. station and listen to its news broadcasts, or would call his radio station and ask someone what was going on. These were his three sources for news upon which he would base his daily report to *USA TODAY*. (R23, Exh. 4, pp. 17, 18).

In preparation for his deposition, Baas reviewed the AP wires which were sent to his radio station on December 20, 1990 and scripts of the television news broadcasts to which he may have listened on December 20. Of these sources, the only one which mentioned the race track would reopen on Jan. 2nd was the transcript of the television news which was broadcast at 6:00 CST or 7:00 EST. (R23, Exh. 4, pp. 36).

The defamatory article stated the track would reopen on January 2nd. No AP wire mentioned when, or if, the track would reopen. According to Davis and Baas, the only source for the reopening of the track was the 6:00 CST television news broadcast. (R23, Exh. 4, pp. 36 and Exh. 1 and 2 to Exh. 4). Therefore, the news item had to have been supplemented after Davis' 6:00 EST deadline.

Mr. Baas is familiar with the term URGENT in AP wires. The term indicates the story is just breaking and this is the story's first appearance on the wire. Mr. Baas is also aware that such wires are often followed with different versions of the same story which can alter the information in the first wire. (R23, Exh. 4, pp. 21, 22).

At the request of Plaintiff's counsel, Mr. Wayne Greenhaw rendered an opinion as to the propriety of Defendants' action in publishing the news item. His affidavit states:

> That I have reviewed the news items published on December 21, 1990 and December 28, 1990 by *USA TODAY* and the Associated Press wires of December 20, 1990, pertaining to the settlement of a dispute with the Wisconsin Rac-

ing Board. I have also read the deposition of Mr. Larry Davis, the writer who composed the articles for *USA TODAY*.

In my opinion Mr. Davis and *USA TODAY* engaged in highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.

It is common knowledge within the newspaper industry that an initial wire from AP marked "URGENT" signifies the wire pertains to a news event which has just occurred and that the wire has been rushed by AP. The word "MORE" is a red flag that additional AP wires will be forthcoming on the same story. Read together, the words "URGENT" and "MORE" on an AP wire notifies the receiver that the story is a rushed story which will be supplemented, altered or detailed in subsequent wires.

In my opinion, no responsible publisher would publish a news item based on an initial AP wire marked "URGENT" and "MORE" without consulting the subsequent wires. The only exception would be if the news story was of such importance that the event justified instantaneous reporting. This exception applies mainly to broadcast media and is always accompanied with a statement to the effect: "This story just in", etc. In all such instances, the broadcast media can immediately broadcast corrections.

In the present case, the news item was not a hot topic for Mr. Davis or *USA TODAY*. Rather it filled a requirement as a public interest story out of Wisconsin. There is no justification for

not consulting the additional wires before publication.

The newspaper industry relies on the Associated Press and its reporting. The newspaper industry, however, understands the meaning of "URGENT" and "MORE." In my opinion no newspaper can justifiably rely on an AP wire which informs the newspaper the story is incomplete, unless there are extenuating circumstances. From my review there are no extenuating circumstances in this case.

The initial AP wire viewed by Mr. Davis told him of a late breaking story but also, in effect, said "Don't rely solely on this wire. It is incomplete. More is coming."

Attached hereto is my résumé which contains an adequate description of my qualifications.

(R18, Exh. 3)

USA TODAY receives the AP state wires from all 50 states, including the Wisconsin state wire. (R23, Exh. 4 - 12 - 9, 32). This is the state wire from Wisconsin, not a national or mixed wire. Mr. Kendal Weaver, a representative of Associated Press, testified

If they [subscribers] subscribe to the Wisconsin Wire, it may vary a little bit from newspaper to newspaper, depending on what they have in their ports that they're receiving, because things can back up on some and not on others, but it is usually pretty close to the time that AP transmits, and I'm talking about within minutes, usually.

(R23, Exh. 3)

Even though *USA TODAY* did not keep a log of the AP reports it actually received, the evidence is undisputed that *USA TODAY* received the AP Wisconsin wire and that the wires would be received within minutes of the time AP transmits the wires.

John Baas, the stringer in Madison, Wisconsin testified his purpose was to call *USA TODAY* and report which were the public interest stories in his state. According to Mr. Baas:

> I would do my normal duties for the radio station, and then later in the day, I was to make the phone call. I believe it was 5:00 was the time I was supposed to call in, 5:00 Milwaukee time. That time changed, though, from over the years. It was sometimes 4:00, it was sometimes 5:00.
>
> Q. Okay. 5:00 in the afternoon?
>
> A. Yeah.
>
> (R23, Exh. 4, p. 12)

(III) Basis for Federal Jurisdiction in Court of First Instance

The United States District Court for the Southern District for Alabama, gained jurisdiction by a removal petition based on diversity. The 11th Circuit Court of Appeals was the appropriate appellate court to entertain the appeal pursuant to 28 U.S.C. § 41 and had such jurisdiction over such final decision pursuant to 28 U.S.C. § 1291.

ARGUMENT

(I) Scope of Review

In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), this Court set forth the standard of review applicable to a motion for summary judgment in a defamation case succinctly stating:

> Thus, where the factual dispute concerns actual malice, clearly a material issue in a New York Times case, the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not.
>
> 477 U.S. at 255, 256

To answer this question a court still follows the standard rule that "the evidence of the non-movant is to be believed and all justifiable inferences are to drawn in his favor". *Id.* 477 U.S. 255.

In *Anderson, supra,* this court further cautioned:

> Neither do we suggest that the trial court should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial. (Citation omitted.)
>
> 477 U.S. at 255

Finally, this Court in *Anderson, supra,* stated:

> We repeat, however, that the plaintiff, to survive the defendant's motion, need only present evidence from which a jury might return a verdict

> in his favor. If he does so, there is a genuine issue of fact that requires a trial.
>
> 477 U.S. at 257

(II) Amplification of Reasons for Allowance of Writ

A. The Actual Malice Rule of New York Times v. Sullivan *Should Be Limited Or Overruled.*

The press and media of the United States have a judicial license to libel which permits them to defame, not just public officials, but limited public figures, with impunity. This license allows publishers to escape all responsibility for violations of professional standards, regardless of the magnitude of their deviation from reasonable and acceptable reporting standards. It is not part of the Constitution of the United States, is not imbedded in the First Amendment, and is not a long standing monument of the law. Rather, it is a product of judicial invention which was not adopted until over one hundred seventy-five years after the adoption of the Bill of Rights.

This Petition for Certiorari seeks a balance between the rights of individuals who engage in public affairs not to have their reputations falsely impugned and the right of the press to responsibly report the news. A common sense balancing of these rights must allow for redress of false and defamatory publications which are the result of reckless indifference to an individual's good name. An appropriate balance cannot be obtained unless the actual malice rule is limited by this Court.

In *New York Times v. Sullivan,* 376 U.S. 254 (1964), this Court, for the first time, held:

> The constitutional guarantees require, we think, a Federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he

> proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard whether it was false or not.
>
> 376 U.S. at 279, 180

The maxim "bad facts lead to bad law" has never been more miserably true than in *Times v. Sullivan.*

In *Times, supra,* Sullivan was one of three elected commissioners for the City of Montgomery, Alabama whose duties specifically included the supervision of the police department. He claimed to have been libeled by individuals and The New York Times Company as a result of a full-page advertisement in The *New York Times.* The advertisement made no specific reference to the commissioner but stated that Negro students engaged in positive affirmation of their right to live in human dignity were being met by "those who would deny and negate" them those rights. The advertisement contained photographs to illustrate a "wave of terror" and stated that Dr. Martin Luther King, Jr., who had been previously arrested on several different occasions, was facing a perjury indictment in Montgomery, Alabama. The advertisement stated that students were expelled from their school and truckloads of police armed with shotguns and teargas had ringed the Alabama State campus. The advertisement stated "they" have bombed Dr. King's home, almost killing his wife and child, and "they" have assaulted his person.

The commissioner contended that the word "police" referred to him because he was the Montgomery commissioner supervising the police department. Arguably, paragraphs using the term "they" referred to the police, which was a reference to the commission, which referred the matter to Sullivan. The *Times* received the advertisement from a New York advertising agency known by The

Times as a legitimate and respected advertising agency. The *Times*, in its response to a letter from Sullivan seeking a retraction, inquired as to how Sullivan was connected to the advertisement. The *Times* even printed a retraction when asked to do so by Alabama Governor Patterson, believing that the advertisement may have maligned the State of Alabama.

The decision in *Times v. Sullivan* was rendered during a time of great social unrest and distrust, not only between Blacks and Whites, but also between Southerners and Northerners. The underlying decision of the Alabama Supreme Court in *Times, supra,* upholding a jury verdict can only be seen as a product of those times. Reversal of the Alabama Supreme Court's decision was based on legitimate legal grounds in that the advertisement did not concern or identify Commissioner Sullivan and the *New York Times* acted appropriately in receiving the advertisement from a respected advertising agency. The extension of the opinion in *Times v. Sullivan* creating restrictions on an individual's right to recover for libel was not necessary for reversal of the verdict and lacked any common sense relationship to the case itself.

In *Times v. Sullivan,* this Court recognized that, under Alabama law, the only defense to a case of libel per se was the defense of truth. Regardless of a defendant's degree of fault or degree of culpability, his only defense was the truth of the matter published. This placed an insurmountable burden on a publisher to verify the accuracy of each and every article or be subject to damages for libel. This result was, and is, incompatible with the First Amendment.

To correct this legal wrong, this Court enacted the actual malice rule. In doing so, it stretched a legal tightrope from the position that under Alabama law, the only defense for libel per se was the truth, to the position that recovery against a public official for libelous statements

requires a showing of actual malice. The court tiptoed over the duty to use reasonable care by ignoring the concept. This country's tort law was based upon that standard. Yet, this Court never even acknowledged such a standard of responsibility. To the contrary, *Times, supra,* negated any requirement for responsible conduct by requiring actual malice.

In *Curtis Publishing Company v. Butts,* 383 U.S. 130 (1967), there was noted a difference in First Amendment concerns between defamation of a public "figure" and defamation of a public "official":

> "The similarities and differences between libel actions involving persons who are public officials and libel actions involving those circumstanced as were Butts and Walker, viewed in light of the principles of liability which have general applicability in our society, lead us to the conclusion that libel actions of the present kind cannot be left entirely to state libel laws, unlimited by any overriding constitutional safeguard, but that the rigorous federal requirements of New York Times are *not* the only appropriate accommodation of the conflicting interest at stake. We consider and would hold that a 'public figure' who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and report ordinarily adhered to by responsible publishers. (emphasis added).
>
> 388 U.S. at 155

Justice Harlan's opinion in *Curtis Publishing Company* injected the concept of fault and culpability as a basis for establishing liability.

The distinction between public figures and public officials, however, was ignored and, finally stripped. In *Harte-Hanks Communications, Inc. v. Connaughton,* 491 U.S. 657 (1989), this Court did away with any suggestion of a professional standards rule, holding:

> "Today, there is no question that public figure libel cases are controlled by the New York Times standard, not by the professional standards rule which never commanded the majority of this Court."
>
> 491 U.S. 666

It is the lack of a standard of care and the absence of a duty to accept responsibility inherent in the actual malice rule that is uncalled for by the First Amendment. The First Amendment gives the right to speak freely without the threat of recrimination but does not give a concurrent right to speak irresponsibly, and against all rules of reasonable conduct, without recrimination.

The end result is that publishers may defame limited public figures without regard for any standard of care, or requirement of responsibility, or regard for a an individual's reputation. They are given an unbridled license to libel provided they don't take any steps to question the truthfulness of their stories. Through self-imposed ignorance, a publisher is protected from liability.

The framers of the Constitution never intended to grant publishers an abusive and unbridled prerogative to defame without recourse. The history of First Amendment protection has shown tremendous concern for the chilling effect on the right to a free press. But the actual malice rule, at least for non-political public figures, goes

way beyond the full protection of the rights of a free press and actually encourages false accusations and character assassinations. The press should not have the privilege of publishing false information excused by a blind claim of ignorance, or worse — no malice. The law must be that the press has an obligation to check its facts or be liable for refusing to do so.

Protecting the interests of businessmen and women and preserving their excellent reputations is, or should be, on a par with protecting freedom of the press. No other press in a Western free country is excused from any and all responsibility for its publications. In England, which has had a "free" press longer than any country on Earth, a publisher is held responsible for publishing false information, even against public officials. Acceptance of that responsibility does not limit its right to free speech and does not "chill" its rights of free speech or freedom of the press — it simply affords offending publishers a choice to either print a genuine retraction or become liable for the defamation.

Although the actual malice rule was intended to prevent any chilling effect, it has actually chilled access to public office. Character assassination, free from any threat of punishment, has had a profound impact on persons willing to engage in public service. Smart and honorable citizens of this great country are refusing to seek public office, or even provide public service, simply due to the maliciousness of the press and media. As long as no responsibility is placed on the press or media, this chilling effect will remain. It is an effect that can be traced directly to the actual malice rule of *Times v. Sullivan.*

Times v. Sullivan relieves the press from any legal obligation to publish responsibly or reasonably. Holding one responsible for his actions deters one from wrongdoing. Holding the press and media responsible for its actions

will help deter unfettered and unjust attacks on public figures and public officials.

The First Amendment guarantees freedom of assembly and freedom of religion in addition to freedom of the press. Yet freedoms of assembly and religion are not unbridled. Citizens cannot physically run roughshod over other citizens, perhaps of smaller statute, and injure them en route to assemble, and claim that to be held accountable for the injury would have a "chilling effect" on their precious right to assemble. Nor can citizens violate laws and rights of other individuals in the name of religious freedom. Any court would deem absurd an argument that the freedoms of assembly and religion justify injuring others. But this same logic is used by the press and media to obtain their license to libel. The cry for a free press and attendant fears of a "chilling" effect have allowed the press to cast aspersions upon and ruin reputations with impunity.

The most powerful special interest group in America is the handful of large corporations which own and control "the press." By constantly crying and whining about free speech and "chilled" rights, these gigantic mega-corporations have grafted a unique position onto the civil law that allows them to injure others with almost absolute impunity. Only this special interest group is granted the right to openly, freely and intentionally harm ordinary individuals without the threat of reprisal through civil damage suits.

A change is long, long overdue. "The press" should be given the same rights as everyone else. Its enjoyment of constitutional freedoms should be the same as the enjoyment of other First Amendment freedoms by other citizens. This freedom is guaranteed. But the exercise of this freedom must carry with it a responsibility. The "press" should face the same choice other Americans face —

exercising its Constitutional freedom without wrongfully injuring others, or explaining a contrary choice to a jury.

B. The Decision of the Eleventh Circuit Fails to Follow the Guidelines Set Forth By This Court In Harte-Hanks v. Connaughton, *491 U.S. 657 (1989)*

The key legal question is whether a jury could find from the evidence that *USA TODAY* acted with reckless disregard. The key factual question, with belief given to the evidence of the non-movant plaintiff, is whether *USA TODAY* failed to exercise reasonable care in determining the truth, purposefully avoided discovering the truth, and had a degree of awareness of the falsity of the story.

In *Harte-Hanks vs. Connaughton,* 491 U.S. 657 (1989), this Court stated a lack of care and avoidance of the truth can be considered proof of actual malice. Even though a gross deviation from the standards of newspaper reporting, in and of itself, is not sufficient to prove actual malice, such deviation is a factor. Similarly, a failure to investigate, in and of itself, may not prove actual malice but an avoidance of the truth will.

> Although failure to investigate will not alone support a finding of actual malice, see *St. Amant,* 390 US at 731, 733. 20 L.Ed. 2d 262, 88 S. Ct. 1323, the purposeful avoidance of the truth is in a different category.
>
> 491 US at 692

When the lessons of *Harte-Hanks* are applied to the present situation, one becomes convinced Plaintiff has proved a prima facie case of actual malice. Initially, the news item is false. The article contained two inaccurate statements which Meisler alleges were published with actual malice: (1) Meisler was removed from Dairyland's

ownerships; (2) the Board had ordered Meisler to pay $1 million as part of the settlement. (R24, Exh. 8).

Secondly, the Defendants grossly departed from ordinary standards of reporting. The AP wire upon which the news item was based, was marked "URGENT" and concluded with the word "MORE". In the expert opinion of Wayne Greenhaw, such words indicated the wire, in and of itself, could not be relied upon. Clearly, the term "URGENT" marked the wire as a fast breaking news item. The term "MORE" indicated a follow-up story was coming. Newspaper editors, writers and personnel know and understand that follow-up AP wires can alter the original story. In the opinion of Mr. Greenhaw, there was no justification for publishing the news item without reading the additional wires.

Third, Defendants had in their possession the AP wire which clarified the suspect first wire but chose not to review it. The District Court held that even though the initial wire indicated a follow-up wire would be forthcoming, the indication did not mean "that the information in the initial wire was dubious or untrustworthy." (R25 - 9). This determination was contradicted by Mr. Wayne Greenhaw:

> In my opinion no newspaper can justifiably rely on an AP wire which informs the newspaper the story is incomplete, unless there are extenuating circumstances. From my review there are no extenuating circumstances in this case. Defendants knew the first wire was suspect and should not be relied upon.
>
> (Folder 2, Exh. 3)

The Plaintiff presented evidence that the first wire could not be relied upon. The Plaintiff also presented evidence that the second wire was ignored.

The first AP wire which Mr. Davis admits he saw was timed 1549 CST (4:49 EST). The second AP wire which corrected the first wire was timed 1621 (5:21 CST). Mr. Kendal Weaver, a representative of Associated Press, testified:

> If they [subscribers] subscribe to the Wisconsin Wire, it may vary a little bit from newspaper to newspaper, depending on what they have in their ports that they're receiving, because things can back up on some and not on others, but it is usually pretty close to the time that AP transmits, and I'm talking about within minutes, usually.
>
> (R24 - 11 - 35)

Therefore, *USA TODAY* received both wires by 5:30 P.M., thirty minutes before Mr. Davis' alleged deadline of 6:00 P.M. If the second wire was received more than 30 minutes prior to Davis' time of publication, Davis should have known, and very possibly did know, of the falsity of the article.

The Defendants' sole source as to timing and deadlines is Davis. Mr. Davis' testimony, however, is purely and simply untrue.

Mr. Davis stated the *USA TODAY* experience with the AP wire resulted in "sometimes as much as an hour or more delay." (Folder 2, Exh. 6, p. 72) This is simply not true as shown through the testimony of Mr. Kendal Weaver. Even Mr. Davis doesn't state there was an hour delay on the wire in question. He simply states there was sometimes an hour delay. It is incredulous to believe that *USA TODAY* would receive news an hour later than every other paper in America.

The exact deadline of *USA TODAY* is also in question. Mr. Davis testified he had "like, a six o'clock deadline."

(Folder 2, Exh. 6, p. 49) John Baas, the stringer in Madison, Wisconsin testified his purpose was to call *USA TODAY* and report which were the public interest stories in his state. According to Mr. Baas:

> I would do my normal duties for the radio station, and then later in the day, I was to make the phone call. I believe it was 5:00 was the time I was supposed to call in, 5:00 Milwaukee time. That time changed, though, from over the years. It was sometimes 4:00, it was sometimes 5:00.
>
> Q. Okay. 5:00 in the afternoon?
>
> A. Yeah.
>
> (Folder 2, Exh. 9, p. 12)

If the reports were not called in until 5:00 Milwaukee time, Central Standard Time, the deadline for Mr. Davis could not have been 6:00 Eastern Standard Time. Mr. Davis has been untruthful about his deadline. Moreover, Mr. Davis didn't leave until 7:30.

Not only is Mr. Davis' "deadline" suspect, the evidence clearly shows the news item at issue was not completed until after 7:00 EST. On December 20, 1990, the date of the AP wire, Mr. Baas did not go to work. He stated he would have received his information about the story from his fellow employees at the radio station or from television news broadcasts. Mr. Baas was shown the AP wires sent to the radio stations and a copy of the television news broadcasts. The television newscast which ran at 7:00 EST was the only source which stated the track would reopen January 2nd. No other wire issued at anytime had the date of the track reopening. (Folder 2, Exh. 9, p. 36). Of course, *USA TODAY* reported the date of the track's reopening.

Therefore, of Mr. Davis' available sources, only the stringer Mr. Baas, could have provided the date the track would have reopened. Mr. Baas' only source could have been the television news. None of the radio wires which went to his radio station mention the date the track was to reopen. The television news broadcast did not occur until 7:00 EST.

The *USA TODAY* item had to have been altered after the "deadline" of 6:00 because the date of the track opening was not available to any source until after 7:00. Consequently, *USA TODAY* had possession of the correcting AP wires prior to the last time the story was altered. Mr. Davis' testimony that the correcting wires did not come in until after his deadline is regretfully untrue. If the evidence is considered in a light most favorable to the Plaintiff, the evidence shows *USA TODAY* had in its possession the subsequent wires before their supposed "deadline" of 6:00 and an hour and a half before the news item was completed. Yet, *USA TODAY* published the article based upon an unreliable source.

Additionally, Justice Blackmun, in a concurring opinion in *Harte-Hanks vs. Connaughton*, 491 U.S. 657 (1989), stated:

> The form and content of the story are relevant not only to the falsity and neutral reportage questions, but also to the question of malice.
>
> 491 U.S. at 695

The state of mind of the writer of the story can be shown through the language used in the article. In this case Mr. Davis knew the parties had reached a settlement of their dispute. However, the news item stated the racing board had "ordered" four Alabamians pay the state one million dollars. No discussion is needed to distinguish the seriousness between some one agreeing to do something

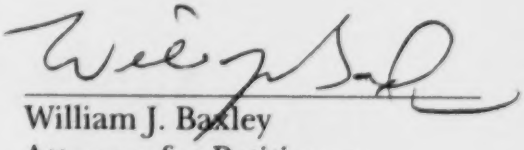
and being ordered to do something. Mr. Davis recognized this distinction. (Folder 2, Exh. 6, p. 109)

Finally, in *St. Amant v. Thompson,* 390 U.S. 727 (1968), this Court stated a defendant cannot insure a favorable verdict by "testifying that he published with a belief that the statements were true." *Id.* at 732. In the present case, however, the Defendants have so testified. They claim they believed it was true because they did not review the second AP wire. Whether Davis did or did not conduct such a review should be left to the jury. Based on Davis' other testimony, a jury could easily choose to believe that Davis followed the usual and customary procedures and reviewed the subsequent wire which he knew to be forthcoming. According to the Plaintiff's evidence, the Defendants published a false defamatory statement. They grossly deviated from ordinary standards of reporting. They relied on an unreliable AP wire marked "URGENT" and "MORE." They deliberately failed to access follow-up AP wires which corrected the initial story. They intentionally used terms such as "ordered" as opposed to "agreed" to damage the Plaintiff. These factors were all present in *Harte-Hanks, supra,* wherein this Court held the plaintiff had proven actual malice. Similarly, the Plaintiff in this case has proven a case to defeat summary judgment.

CONCLUSION

For the foregoing reasons, Petitioner requests that his Petition be granted, the decisions of the Eleventh Circuit Court of Appeals and the United States District Court for the Southern District of Alabama be reversed, and the case remanded for trial.

Respectfully submitted,



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Herbert MEISLER, Plaintiff-Appellant,

v.

GANNETT COMPANY, INC.; USA TODAY, Defendants-Appellees.

No. 92-7052.

United States Court of Appeals, Eleventh Circuit.

Jan. 28, 1994.

Appeal from the United States District Court for the Southern District of Alabama.

Before HATCHETT and COX, Circuit Judges, and RONEY, Senior Circuit Judge.

PER CURIAM:

This appeal arises out of an action for libel. Herbert Meisler, the plaintiff, appeals the district court's grant of summary judgment in favor of the defendants Gannett Co., Inc. and USA TODAY ("defendants"). Meisler argues that the district court erred in concluding that the evidence could not support a finding of actual malice. We affirm.

I. FACTS AND PROCEDURAL HISTORY

In 1987, Herbert Meisler and Harold Ripps became interested in dog racing. In October 1988 Meisler, Ripps, Herman Maisel, and Elliot Maisel, as equal partners,

formed the American Racing Group to hold their interests in greyhound parks in Wisconsin, Kansas, and Texas. These four were known as "the Alabamians" and the "Alabama four."

The four, along with some Wisconsin investors, formed Dairyland Greyhound Parks, Inc. ("Dairyland") and obtained a license to operate the Dairyland Greyhound Park in Kenosha, Wisconsin. Dairyland Park opened to the public on June 20, 1990, but on July 19, 1990, the Wisconsin Racing Board ("the Board") filed a petition for disciplinary action against Dairyland. A press release issued by the Board noted that the petition alleged that certain individuals "have committed illegal acts of fraud, deception and coercion for financial gain and to halt board investigations." The petition detailed specific improper acts by Dairyland, American Racing Group, and the Alabama investors. The Board's accusations generated a great deal of press coverage.

The Board scheduled a disciplinary hearing for December 20, 1990, but reached a settlement with all parties. That day between 4:00 P.M. and 4:35 P.M. Eastern Standard Time, the Executive Director of the Board verbally announced the terms of the settlement at the scheduled hearing and then presented a settlement agreement and consent order signed by all parties.

The verbal announcement was not detailed but reported that the settlement included imposition of a forfeiture of $1,000,000 and costs totalling $150,000; that there would be complete and total divestiture of all culpable individuals in the matter; that both Elliot Maisel and Herman Maisel had tendered their stock certificates to an escrow account; that American Racing Group would be dissolved and cease operations in Wisconsin; that the four Alabama investors would no longer participate in the kennel booking process and would resign as officers and directors of the Park; and that Elliot Maisel

had agreed to divest himself of all ownership interests in Dairyland.

The signed settlement agreement and consent order detailed the settlement's terms and provided that the fine and costs assessed were to be paid by Dairyland, not the four Alabama investors. The agreement required Meisler and Ripps to acquire the stock in Dairyland held by the Maisels, after which the Maisels were to have no interest in Dairyland.

At 4:49 P.M. Eastern Standard Time, the Associated Press issued a wire regarding the settlement between the Board and Dairyland. The wire was marked "URGENT" and concluded with the notation "MORE." The wire read as follows:

> BOARD OKs DAIRYLAND AFTER ACCEPTING SETTLEMENT
>
> BY RICHARD EGGLESTON
> Associated Press Writer
>
> MADISON, Wis. (AP) — The State Racing Board Thursday granted an operating license for 1991 to the troubled Dairyland Greyhound Park Inc. after accepting a settlement that removes the race track's Alabama investors.
>
> Under the settlement, the Alabama Group, American Racing Group, Inc., will be dissolved and will pay the State $1.15 million to settle a disciplinary action against those investors.
>
> The State has already received the first $600,000 downpayment of the fine and is to receive the remaining $550,000 by Dec. 31.
>
> The decision leaves Dairyland Chairman Richard Decker of Eagle River, a new management team and a group of Wisconsin investors in control of the track.

"I've learned one thing. If you start honest and stay honest, you'll win," Decker told the Board. "It makes one heck of an early Christmas present."

Madison Attorney David C. Mebane, Vice Chairman of the Board who presided at Thursday's meeting, said Dairyland would be held to the letter of its license requirements.

"This Board will continue to monitor the operations of this facility daily," Mebane said. "If this facility falls in violation of any of the regulations, the licensee will be back before this Board post haste."

The settlement also provides for the parties to pay $3.1 million that Dairyland owes to contractors.

Kenosha, Kenosha County and the Town of Somers are to receive $25,000 each for money they lost due to the tardy opening of the track last summer.

Later that day, writer Larry Davis of USA TODAY wrote a two-sentence news item concerning the settlement under the "Wisconsin" heading of the "ACROSS THE USA: NEWS FROM EVERY STATE" section for the December 21, 1990, issue of USA TODAY. The item read:

WISCONSIN

KENOSHA — Dairyland Greyhound Park can reopen Jan. 2, state racing board said. Board removed 4 controversial Alabama investors from track ownership, ordered 4 to pay state $1 million as part of settlement of state racing board violations this year . . .

Davis's primary source for the article had been the Associated Press ("AP") newswire about the announced settlement. It appears that Davis had also talked by telephone with John Bass, USA TODAY's Wisconsin "stringer." Neither Baas nor Davis specifically recalls talking that day, but no other source is apparent for the statement in Davis's item that the Park could reopen on Jan. 2.

At 5:21 P.M. Eastern Standard Time, thirty-two minutes after the first wire, the Associated Press issued a second wire. The wire read, in relevant part:

> URGENT
>
> CLARIFIES that two Alabama investors can retain stock with no role in managing track: UPDATES throughout with further detail background; NOTE story stands for AM-WI —
>
> . . . . .
>
> He says the settlement met the Board's goal of removing the Maisels from any involvement with Dairyland.
>
> . . . . .
>
> The settlement also provides for the parties to pay $3.1 million that Dairyland owes to contractors.
>
> Kenosha, Kenosha County and the Town of Somers are to receive $25,000 each for money they lost due to the tardy opening of the track last summer.
>
> The Racing Board had refused to renew Dairyland's license after a summer of mismanagement allegations.
>
> The Board ruled Dairyland's top management lacked sufficient experience to operate a track after the Maisels withdrew from the operation at the State's demand.

> The Maisels had been named in a petition filed by Dunleavy accusing them of fraud, coercion and deception in managing the track.
>
> The allegations had to do with hidden contracts between Dairyland and American Racing Group.

The only wire Davis read was the initial AP wire. Neither Davis nor anyone else at USA TODAY looked for later wires. (Appellant's Br. at 12).

On December 21, 1990, attorneys for Meisler and Ripps sent a letter to USA TODAY asserting that the item in question contained false statements and demanding a retraction. On December 28, 1990, USA TODAY published a correction — again in the "Wisconsin" section — which read:

> CORRECTION — State Racing Board barred 4 Alabama investors from Dairyland Greyhound Park, Inc. management, but did not order all 4 to give up their ownership shares. Dairyland — not the 4 investors — agreed to pay state $1 million for not starting racing on schedule last summer.

Meisler subsequently filed suit. The complaint includes a single count and asserts a claim for libel. It alleges that the news item in question was false in that Meisler "was never ordered to pay any money as part of any settlement for alleged racing board violations and was not removed from track ownership." (R.1-1-11). Following discovery, the district court granted the defendants' motion for summary judgment, concluding that no reasonable jury could find actual malice by clear and convincing evidence.

II. ISSUE ON APPEAL & STANDARD OF REVIEW

Meisler argues that there is evidence to support a finding of actual malice, making summary judgment inappropriate. The defendants contend that summary judgment was proper.

> We review a district court's grant of summary judgment de novo, viewing the evidence in the light most favorable to the non-moving party. *Southpace Properties, Inc. v. Acquisition Group,* 5 F.3d 500, 504 (11th Cir. 1993); *Key West Harbour Dev. Corp. v. Key West,* 987 F.2d 723, 726 (11th Cir. 1993).

III. DISCUSSION

The test for reliability in a defamation action depends on "whether the libeled party is a public or private figure and on whether the defamatory publication addresses a public or private concern." *Silvester v. American Broadcasting Cos.,* 839 F.2d 1491, 1493 (11th Cir. 1988). If the plaintiff is a "public figure" or a "limited public figure" and the alleged defamatory publication involved an issue of public concern, the plaintiff must prove the defendant made the publication with actual malice in order to establish liability. *New York Times Co. v. Sullivan,* 376 U.S. 254, 279-80, 84 S.Ct. 710, 726, 11 L.Ed.2d 686 (1964) (public officials); *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 342-45, 94 S.Ct. 2997, 3008-09, 41 L.Ed.2d 789 (1974) (public figures and limited public figures); *Silvester,* 839 F.2d at 1493 (same).

Throughout this case, Meisler has acknowledged that he is a "public figure" or a "limited public figure." Additionally, he has not argued that the item in question involved a matter of private concern. "Limited public fig-

ures" are those who "have thrust themselves to the forefront of particularly public controversies in order to influence the resolution of the issues involved." *Silvester,* 939 F.2d at 1494 (quoting *Gertz,* 418 U.S. at 345, 94 S.Ct. at 3009); *see also Long v. Cooper,* 848 F.2d 1202, 1204 (11th Cir. 1988) (noting the three-part analysis for establishing limited public figure status adopted in *Silvester*).

Having acknowledged his status, Meisler necessarily agrees that establishing liability requires proof of actual malice by clear and convincing evidence. Actual malice is proven if the defamation plaintiff shows that the defendant made the statement "with knowledge that it was false or with reckless disregard" for its truth or falsity. *New York Times Co.,* 376 U.S. at 279-80, 84 S.Ct. at 726.

Meisler argues that defendant USA TODAY, through the actions of a Davis, acted with reckless disregard for the truth or falsity of the item in question. Meisler's argument that the evidence supports a finding of "reckless disregard" for truth or falsity essentially rests on three prongs. First, Meisler asserts that the item includes false statements. We will assume this assertion to be true.

Second, Meisler argues that because of the AP newswire's designations of "URGENT" and "MORE," Davis knew that the newswire could not be relied upon and that such reliance constituted a gross deviation from standards of reporting. Meisler provided the affidavit of an expert witness. The witness testified that it was common knowledge in the industry that "URGENT" signifies that AP had rushed the wire. "MORE," he said, indicates that additional wires on the same story would be forthcoming. He expressed the opinion that no responsible publisher would have published a news item based upon the initial AP wire without consulting subsequent wires.

Lastly, Meisler argues that the second newswire was received before Davis's publication deadline and that the second wire was "ignored." There is evidence to support

an inference that the second wire was available to Davis prior to his publication deadline, but the assertion that Davis or others involved were aware of it finds no support in the record.

"Reckless disregard," for purposes of proving actual malice, is shown if "the defendant entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson,* 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262 (1968). Stated differently, the standard is met by proving that the defendants "actually had a high degree of awareness of [the statement's] probable falsity." *Id.* (quoting *Garrison v. Louisiana,* 379 U.S. 64, 74, 85 S.Ct. 209, 216, 13 L.Ed.2d 125 (1964)). *St. Amant* reaffirms the rule that "reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing." 390 U.S. at 731, 88 S.Ct. at 1325. Both of Meisler's expert witnesses admitted that there was no evidence to indicate that Davis acted with knowledge of the article's falsity, or with serous doubts about the truth of the article, or with a high degree of awareness of the article's probable falsity. At best, the defendants' actions were negligent; negligence is not the appropriate standard for proving actual malice. *See St. Amant,* 390 U.S. at 731-32, 88 S.Ct. at 1325-26.

IV. CONCLUSION

We agree with the district court's conclusion that no reasonable jury could find actual malice by clear and convincing evidence on this record.

AFFIRMED.

Supreme Court, U.S.
FILED

931859 APR 28 1994

OFFICE OF THE CLERK

Application No. ___

IN THE

Supreme Court Of The United States

OCTOBER TERM 1993

HERBERT MEISLER,
Petitioner

vs.

GANNETT COMPANY, INC.,
Respondent

SUPPLEMENTAL APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

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Attorney for Petitioner,
HERBERT MEISLER

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IN THE UNITED STATES DISTRICT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

HERBERT MEISLER,	)	
	)	
Plaintiff,	)	
	)	Civil Action No.
v.	)	91-0687-AH-M
	)	
GANNETT COMPANY, INC.; ET AL.,	)	
	)	
Defendants.	)	
	)	

ORDER

This cause is before the Court on the motion for summary judgment filed by Defendants Gannett Company, Inc. ("Gannett") and USA Today. [Doc. 12]. For the reasons that follow, Defendants' motion for summary judgment is GRANTED.

FINDINGS OF FACT

In 1989, four Alabamians, including plaintiff Herbert Meisler, formed the American Racing Group ("ARG"), and obtained, along with other investors, a license to operate the Dairyland Greyhound Park ("the park") in Kenosha, Wisconsin.[1] The park opened in June, 1990,

[1] The other Alabamians were Eliot and Herman Maisel, and Harold Ripps. Ripps has instituted a libel action based on identical facts currently pending in the Northern District of Alabama before district judge Blackburn.

but one month later, the Wisconsin Racing Board ("the board") filed a petition seeking disciplinary action against the park. A press release issued by the board stated that the petition alleged that "certain individuals had committed illegal acts of fraud, deception and coercion for financial gain and to halt board investigations." Plaintiff was charged particularly with threatening certain investors not to cooperate with the board investigations, and as a member of ARG, of conspiring to receive kickbacks in real estate brokerage fees received from the park. The majority of the charges, however, involved other members of the ARG. A hearing was scheduled for December 20, 1990. The disciplinary action generated a great deal of publicity and published commentary during 1990.

At the hearing, the board announced a settlement with the four Alabamians, which the Alabamians, including Plaintiff, had accepted. The settlement included imposition of a forfeiture of $1 million and costs totalling $150,000.00. The board also noted that there would be "complete and total divestiture of all culpable individuals in this matter; both Eliot Maisel and Herman Maisel have tendered their stock certificates to an escrow account". ARG would be dissolved and cease operations in Wisconsin. The four Alabamians would cease to participate in the kennel booking process at the park, and would resign as officers of the park. The board then stated that "Eliot Maisel [(one of the Alabamians)] agrees to divest himself of all ownership interest in" the park. The board then proceeded to approve and sign a settlement agreement and consent decree.

The settlement agreement and consent decree clarified the action of the board vis-a-vis the four Alabamians. The settlement provided that the park, not the Plaintiff, would pay a $1 million forfeiture. The consent order specifically stated that no fines or forfeitures were imposed

on the Plaintiff. The settlement agreement provided that Plaintiff and Ripps (one of the Alabamians) would purchase the stock of the other two Alabamians, and prohibited the latter two, but not the Plaintiff, from becoming officers or directors at the park in the future.

On December 20, 1990, writer Larry Davis of Defendant USA Today wrote a short description of the board action ("the article") that was published in the December 21, 1990 edition of USA Today. The article noted that the board *"removed 4 controversial Alabama investors from track ownership, ordered 4 to pay state $1 million as part of settlement of state racing board violations this year"*. [emphasis supplied]. The article was based on either an Associated Press wire Davis had received just after the settlement was announced or upon information on the settlement provided by John Baas, a Wisconsin "stringer", or on both.[2] The wire stated that the settlement removed the park's Alabama investors, and that they would pay Wisconsin $1.5 million as settlement. The wire clearly bore the messages "URGENT" and "MORE" at the beginning and end of the document, respectively. Defendants knew that a wire bearing such notations might be followed by subsequent wires that might change the initial story. Davis, however, had no knowledge at the time he wrote the article that it contained incorrect information.[3]

The Associated Press also prepared a follow-up wire that clarified the erroneous statements in the first wire. The first wire was dispatched at 4:49 P.M., and the second wire was dispatched at 5:21 P.M. Defendants re-

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[2] Neither Davis nor Baas can positively remember speaking via the telephone on December 20, though they both acknowledge it was a possibility.

[3] Davis deposition at 140.

ceived the second wire at some point after Davis had already written and submitted the article for publication.[4]

On December 21, 1990 lawyers for the Plaintiff claimed the article was false, and demanded an immediate retraction in a prominent position in USA Today. On December 28, 1990 USA Today published a correction stating, under the by-line "CORRECTION", that the board had "barred 4 Alabama investors from [the park's] management, but did not order all 4 to give up their ownership shares. Dairyland — not 4 investors — agreed to pay state $1 million".

CONCLUSIONS OF LAW

Federal Rule of Civil Procedure 56(c) provides that summary judgment shall be granted:

> if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.[5]

"A factual dispute is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. A fact is 'material' if it might affect the

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[4] Defendants have moved to strike certain evidence, including the second Associated Press wire, on the grounds that Plaintiff has failed to show that they received the wire, though Defendant admits that they subscribed to the wire services. The Court DENIES the motion to strike as inappropriate on a motion for summary judgment, but further notes that Defendants have admitted that "other things came across the wire later that day". Deposition of Larry Davis at page 84. Accordingly, the motion to strike is also due to be denied on that basis.

[5] Fed.R.Civ.P. 56(c).

outcome of the suit under the governing substantive law."[6]

The basic issue before the Court on a motion for summary judgment is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.[7] "[T]he moving party has the burden of showing the absence of a genuine issue as to any material fact, and for these purposes the material it lodge[s]", and all factual inferences arising from it, must be viewed in the light most favorable to the nonmoving party.[8] Where the nonmoving party, as here, bears the burden of proof at trial, the burden on the moving party may be discharged by 'showing' — that is, by pointing out to the District Court — that there is an absence of evidence to support the nonmoving party's case.[9]

Once the movant satisfies its initial burden under Rule 56(c) of demonstrating the absence of a genuine issue of material fact, the burden shifts to the nonmovant to "come forward with specific facts showing that there is a genuine issue for trial."[10] Otherwise stated, the nonmovant must "demonstrate that there is indeed a material issue of fact that precludes summary judgment."[11] "A mere 'scintilla' of evidence supporting the [nonmoving]

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[6] *Beck v. Somerset Technologies, Inc.*, 882 F.2d 993, 996 (5th Cir. 1989) (*citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

[7] *Anderson, supra*, 477 U.S. at 251-252.

[8] *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Peppers v. Coates*, 887 F.2d 1493, 1498 (11th Cir. 1989).

[9] *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

[10] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (*quoting* Fed.R.Civ.P. 56(e)) (emphasis removed) (internal quotation marks omitted).

[11] *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). The shifting burden from movant to nonmovant at summary judgment described above applies regardless of which party will bear the burden of proof at trial. Id. at 607.

party's position will not suffice; there must be enough of a showing that the jury could reasonably find for that party".[12] "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial."[13] The moving party is likewise entitled to judgment as a matter of law when the nonmoving party fails to show sufficiently an essential element of the case as to which the nonmoving party has the burden of proof.[14]

Resolution of this motion depends on whether a rational trier of fact could find that Defendants published the article with actual malice as defined by *New York Times Co. v. Sullivan*[15] and its progeny. At issue are two factually erroneous statements in the December 21, 1990 issue of USA Today: first, that Plaintiff was removed from Dairyland's ownership, and second, that the Wisconsin Racing Board had ordered Plaintiff to pay one million dollars as part of the "settlement of state racing board violations". Both of these assertions were corrected in the December 28, 1992 issue of USA Today.

The First Amendment requires a libel plaintiff to show that in publishing a defamatory statement the defendant acted with actual malice, that is, with "knowledge that it was false or with reckless disregard of whether it was false or not."[16] Such actual malice must be shown with "convincing clarity".[17] These requirements apply to libel actions brought by public figures.[18]

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[12] *Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990).

[13] *Matsushita, supra*, 475 U.S. at 587 (citation omitted).

[14] *Peppers, supra*, 887 F.2d at 1497; *Manor Healthcare Corp. v. Lomelo*, 929 F.2d 633, 636 (11th Cir. 1991).

[15] 376 U.S. 254 (1964).

[16] *Id.* at 279-280.

[17] *Id.* at 285-86.

[18] *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

Here, Plaintiff argues that Defendants, in publishing "a news item based on an incomplete AP wire, knowing that subsequent wires could change the news report", published the article at issue in this action with reckless disregard for its truth. Plaintiff admits, for purposes of this motion, that he is a "limited public figure".[19]

The Supreme Court has held that "reckless conduct is not measured by whether a reasonably prudent [person] would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice."[20] Actual malice will also exist where a defendant publishes the false statement "with a high degree of [actual] awareness of probable falsity".[21] A public figure plaintiff must prove more than an extreme departure from professional standards in order to establish actual malice.[22] A jury may find recklessness "where there are obvious reasons to doubt the veracity of the" information relied upon.[23] In determining whether a statement is published with actual malice, the Court's primary focus must be on the publisher's subjective belief in the truth or falsity of the statement.[24]

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[19] *Silvester v. American Broadcasting Companies, Inc.* 839 F.2d 1491, 1494 (11th Cir. 1988).

[20] *St. Amant v. Thompson*, 390 U.S. 727, 713 (1968).

[21] *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 667 (1989) (*quoting Garrison v. Louisiana*, 379 U.S. 64, 74 (1964)); *Masson v. New Yorker Magazine, Inc.*, 501 U.S. ___, ___, 111 S.Ct. 2419, 2429 (1991). *See also Harte-Hanks, supra*, 491 U.S. at 688.

[22] *See id.* at 665.

[23] *St. Amant, supra*, 390 U.S. at 732; *see generally Pemberton v. Birmingham News Co.*, 482 So.2d 257 (Ala. 1985) for an application of the *St. Amant* standards in a defamation action arising under Alabama law.

[24] *Harte-Hanks, supra*, 491 U.S. at 688; *Price v. Viking Penguin, Inc.*, 881 F.2d 1426 (8th Cir. 1989), *cert. denied*, 110 S.Ct. 757 (1990);

On a motion for summary judgment, the determination of whether a given material factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case. Where the factual dispute concerns actual malice, "the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not".[25]

The Court concludes that Defendants have met their burden of showing that there is an absence of evidence to support Plaintiff's case. Indeed, the record contains not a shred of evidence indicating that Defendants in fact entertained serious doubt as to the truth of the article in question. Nor did Defendants possess a high degree of awareness of its probable falsity. Larry Davis did not know or believe the article was false at the time of publication, nor were there obvious reasons to doubt the veracity of his sources, including the Associated Press wire. It is true that the initial wire indicated that a follow-up wire should be expected, but that did not mean that the information in the initial wire was false, nor did it indicate that the information in the initial wire was dubious or untrustworthy.

Moreover, Plaintiff's response fails to come forward with specific facts showing there is a genuine issue for trial. The evidence in the record simply cannot support a reasonable jury finding that Plaintiff could show actual malice by clear and convincing evidence.[26]

Clyburn v. News World Communications, Inc. 705 F.Supp. 635 (D.D.C. 1989), *aff'd*, 903 F.2d 29 (D.C.Cir. 1990).

[25] *Anderson, supra*, 477 U.S. at 255-56 (footnote omitted).

[26] *Anderson, supra*, 477 U.S. at 255-56 (footnote omitted); *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991).

The Court understands Plaintiff's main argument to be that Defendants' failure to read subsequent AP wires which altered the news story constituted a gross deviation from standard publishing practices. However, the Supreme Court dispatched this argument in *Harte-Hanks, supra.*[27] As the Supreme Court stated in *Harte-Hanks, supra,* "[o]ur profound national commitment to the free exchange of ideas, as enshrined in the First Amendment, demands that the law of libel carve out an area of 'breathing space' so that protected speech is not discouraged".[28] Accordingly, Defendants' motion for summary judgment is GRANTED. Judgment will be entered by a separate document.

DONE this 27th day of October, 1992.

/s/ Alex T. Harcourt, Jr.
CHIEF UNITED STATES
DISTRICT JUDGE

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[27] *Harte-Hanks, supra,* 491 U.S. at 666. *See also Zerangue v. TSP Newspapers, Inc.,* 814 F.2d 1066 (5th Cir. 1987).

[28] *Harte-Hanks, supra,* 491 U.S. at 686 (quotations and citations omitted).